83-703

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY,
Respondent,

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Provisions of the Atomic Energy Act (Section 189; 42 U.S.C. § 2239) and the Administrative Orders Review Act (28 U.S.C. § 2342) confer exclusive jurisdiction on the courts of appeals to review final Nuclear Regulatory Commission orders in any proceeding "for the granting, suspending, revoking, or amending of any license. . . ." The question presented is whether those statutes confer subject matter jurisdiction upon the courts of appeals to review orders of the Commission refusing a request to institute such a proceeding.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 712 F.2d 1472 (D.C. Cir. 1983), and is reproduced in the Appendix. That opinion was issued on review of a decision of the Director of the Office of Nuclear Reactor Regulation of the United States Nuclear Regulatory Commission. *Florida Power & Light Company* (Turkey Point Plant, Unit 4), DD-81-21, 14 NRC 1078 (1981). The Director's decision is also reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated July 26, 1983. Issuance of the mandate was withheld until seven days after disposition of any timely petition for rehearing. The Government Respondents filed a timely petition for rehearing and suggestion for rehearing *en banc*, which were denied on September 22, 1983. However, issuance of the mandate was stayed pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure until October 31, 1983, pending application for a writ of certiorari. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves consideration of Section 189 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2239), 28 U.S.C. § 2342 and 10 CFR §§ 2.202 and 2.206. These provisions are reproduced in the Appendix. App. 26-31.

STATEMENT OF THE CASE

1. The NRC Proceeding

This case arose as a result of a letter from Joette Lorion, written to the NRC on September 11, 1981, requesting that Turkey Point Unit No. 4, owned and operated by Florida Power & Light Company, an NRC licensee, be shut down immediately for a steam generator inspection and that consideration be given to suspension of the operating license for the unit because of concerns over the safety of its pressure vessel. App. 16-17. The letter was referred to the Director of the NRC's Office of Nuclear Reactor Regulation for consideration in accordance with 10 CFR § 2.206 (*Id.*), which provides a procedure for NRC consideration of requests "to institute a proceeding pursuant to § 2.202 to modify, suspend or

revoke a license, or for such action as may be proper." App. 30.[1]

The Director responded by issuing a written decision discussing each of Ms. Lorion's claims in detail, concluding that none of the action she requested was warranted and denying her requests. App. 16-25. The Commission declined to review the Director's action, which consequently became the final action of the agency.

2. Court of Appeals Proceedings

Ms. Lorion petitioned for review pursuant to Section 189b. of the Atomic Energy Act, as amended (42 U.S.C. § 2239(b)) and the Administrative Orders Review Act (28 U.S.C. § 2342(4)),[2] which, together, grant exclusive jurisdiction to the courts of appeals to review final orders of the NRC entered in any proceeding referred to in Section 189a. of the Atomic Energy Act (42 U.S.C. § 2239(a)). Included in Section 189a. is any proceeding "for the granting, suspending, revoking, or amending of any license. . . ." Florida Power & Light Company intervened.

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[1] 10 CFR § 2.202 authorizes designated NRC officials, including the Director, to institute show cause proceedings "to modify, suspend, or revoke a license." 10 CFR § 2.206 provides that any person may request that such procedings be instituted. The Commission has followed the practice of treating requests that it take such action, whether or not a request expressly refers to 10 CFR § 2.206 or is formally designated a petition, as falling within that provision; and the court below expressly approved such treatment of Ms. Lorion's letter. App. 4.

[2] App. 2. The Administrative Orders Review Act (Act of December 29, 1950, as amended, 28 U.S.C. §§ 2341-2352) grants exclusive jurisdiction to courts of appeals to review "all final orders of the [NRC] made reviewable by section 2239 of title 42 [Atomic Energy Act, § 189]." 28 U.S.C. § 2342(4). Subsection b. of Section 189 provides for judicial review pursuant to the Administrative Orders Review Act of "[a]ny final order entered in any proceeding of the kind specified in subsection a. . . ." Subsection a. proceedings include "any proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit. . . ." 42 U.S.C. § 2239.

The briefs of the parties addressed several issues concerning the propriety of the Commission action, including the Commission's decision to treat Ms. Lorion's letter as a request under 10 CFR § 2.206, and the lawfulness of the Director's disposition of Ms. Lorion's requests. However, the question whether the court had jurisdiction to review the Director's refusal to institute such proceedings was not referred to in any of the briefs. This was obviously because, beginning with the District of Columbia Circuit, every court of appeals which had been presented with the question had either expressly decided that it possessed such jurisdiction or proceeded on that assumption. *Infra*, pp. 5-6.

The issue of jurisdiction was raised for the first time in this case by the panel on oral argument. Government counsel offered to submit a memorandum on the subject. However, the court rejected the offer, and, without receiving any brief or memorandum on the issue from any party, concluded in the decision below that it lacked subject matter jurisdiction over the proceeding. In consequence it transferred the case to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631. App. 15.

Essentially the decision below holds that a request under 10 CFR § 2.206 "triggers a preliminary investigation by the NRC's staff to determine whether a formal proceeding[3] should be instituted . . ." pursuant to Section 189a.; however, the court held, "the Commission's processing of such requests . . ." is not itself such a proceeding under Section 189a. App. 6-7. And, because

[3] Section 189a. provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected" by any proceeding there referred to, including any proceeding "for the granting, suspending or amending of any license. . . ." The court below apparently used the term "formal proceeding" to mean one in which a full adjudicatory hearing is made available to interested persons. App. 5-6, 12-13.

Section 189b. only confers review jurisdiction upon courts of appeals over proceedings referred to in Section 189a., the court below concluded it lacked subject matter jurisdiction over the petitions to review. App. 11-12.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates a Conflict Among the Circuits Regarding the Jurisdiction of Courts of Appeals to Review NRC Denials of Requests Under 10 CFR § 2.206.

As the court below recognized in its discussion of the precedent interpreting Section 189b., its own considered holding in *Natural Resources Defense Council, Inc v. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979), has been uniformly followed by other courts of appeals which have reviewed denials of 2.206 enforcement requests. In *NRDC*, the Court of Appeals for the District of Columbia Circuit agreed with the NRC's argument that Commission denials of requests that it assert its licensing authority were properly reviewable only in the courts of appeals. According to the court, the NRC's order refusing, on jurisdictional grounds, to license certain tanks constructed for the storage of high-level radioactive waste was within the class of final orders exclusively reviewable by the courts of appeals pursuant to Section 189b. and 28 U.S.C. § 2342. The NRDC's argument to the contrary relied on the fact that the NRC's decision preceded, and rendered unnecessary, any licensing action. The court responded that

> In the circumstances of this case, the absence of an application for a license is not dispositive. Since a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license, we hold that NRC's decision was 'entered in a proceeding' for 'the granting . . . of any license.'[4]

[4] 606 F.2d at 1265.

The *NRDC* decision was relied on by the Seventh Circuit in *Rockford League of Women Voters v. Nuclear Regulatory Commission*, 679 F.2d 1218 (7th Cir. 1982), upholding the NRC's denial of a Section 2.206 request to institute construction permit revocation proceedings on the basis of allegedly unresolved safety concerns. The opinion indicated that, while Section 189 could reasonably be interpreted either way, the interests of conformity and judicial economy favored review by the appellate courts.

The D.C. Circuit thereafter followed its earlier *NRDC* holding in *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission*, 690 F.2d 1025 (D.C. Cir. 1982). In *Seacoast*, the court below held that a

> Commission's determination whether to institute a revocation proceeding was 'a necessary first step' in any proceeding for the revocation of the Seabrook construction permits. Hence, we hold that the Commission's final order refusing [a Section 2.206 request] to institute such a proceeding is reviewable by this court under 42 U.S.C. § 2239 (1976).

690 F.2d at 1028. Similar holdings by other Circuit Courts of Appeals have completed the uniform body of case law prior to the decision below.[5]

In this case, however, the Court of Appeals abandoned its previous holdings as well as the precedent in other

[5] *See* County of Rockland v. NRC, 709 F.2d 766 (2nd Cir. 1983), pet. for cert. pending (No. 83-329) (NRC denial of 2.206 request reviewable in courts of appeals); Simmons v. Arkansas Power & Light Co., 655 F.2d 131 (8th Cir. 1981); Sunflower Coalition v. NRC, 534 F. Supp. 466 (D. Colo. 1982); Desroisiers v. NRC, 487 F. Supp. 71 (E.D. Tenn. 1980); Susquehanna Valley Alliance v. Three Mile Island, 485 F. Supp. 81 (M.D. Pa. 1979), aff'd/rev'd in part, 619 F.2d 231 (3rd Cir. 1980), cert. denied sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance, 449 U.S. 1096 (1981); Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979), appeal dismissed, 605 F.2d 556 (6th Cir. 1979), cert. denied, 444 U.S. 1072 (1980); Paskavitch v. NRC, 458 F. Supp. 216 (D. Conn. 1978).

circuits. Pointing to decisions holding that the Commission need not hold hearings on Section 2.206 requests (App. 7), it stated that it is "no longer comfortable with the strain our decisions have placed on the clear-cut language of 42 U.S.C. § 2239." App. 10. Continued the court,

> we can no longer reconcile the 'necessary first step' rationale of *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979) and *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission*, 690 F.2d 1025 (D.C. Cir. 1982) with . . . the Commission's steadfast insistence that the section 2.206 process does not entail a 'proceeding' within the meaning of 42 U.S.C. § 2239(a).[6] Accordingly, we hold that this court is without subject matter jurisdiction to review directly the Commission's section 2.206 decisions under 42 U.S.C. § 2239(b).

App 13-14.

In so holding, the court below created a square conflict among the circuits. While in the Second, the Seventh, and the Eighth Circuits, appeals of NRC denials of Section 2.206 requests for enforcement action against nuclear licensees are now to be heard, on the agency record, by the courts of appeals, the D.C. Circuit Court will not entertain such petitions. The mere existence of that conflict represents a significant enough potential for confusion and unnecessary litigation to justify grant of this petition.[7] We believe it appropriate, how-

[6] In its brief to the court below, the Government argued that Ms. Lorion was not entitled to an evidentiary hearing on her 2.206 request, because such a request is not a Section 189a. proceeding. App. 7; *see also*, App. 13.

[7] Supreme Court Rule 17.1(a); *see, e.g.*, Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559 (1968); Northeastern Pennsylvania National Bank & Trust Co. v. United States, 387 U.S. 213, 217 (1967).

ever, to point out some of the circumstances in which a substantial impairment of the functioning of the federal judiciary, and therefore of the administrative system which is subject to judicial review, is particularly likely as long as the present confusion continues regarding the procedures for obtaining judicial review of 2.206 denials. We do so below.

II. The Decision Below Presents an Important Question of Federal Law.

By deviating from the hitherto uniform view of the circuits that considered the jurisdictional issue presented, the court below injected uncertainty and confusion into an appellate review process which had previously been clear and uniform. If the decision stands, it will encourage forum shopping among circuits by petitioners desiring either court of appeals or district court review. A resident of the Seventh Circuit, for example, would have the option of appealing an NRC denial of a 2.206 request to the Court of Appeals for that Circuit or in the District of Columbia.[8] In the latter case, the decision below would mandate review by one of several possibly appropriate district courts.[9] The incentives to engage

[8] 28 U.S.C. § 2343 provides that "[t]he venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

[9] 28 U.S.C. § 1391(e) provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

In any partciular action, therefore, three different district courts might conceivably each have venue.

in forum shopping would be magnified to the extent that petitioners perceive a variance in district court and court of appeals review practices and among district courts, and a consequent benefit in choosing one court over the other.

Moreover, if the decision below stands, it will result in excessive layers of review in the District of Columbia Circuit. This was a consideration which influenced that court when it first decided the question in the *NRDC* case, 606 F.2d at 1265, and one that led the Seventh Circuit, in *Rockford*, to concur in the conclusion that the courts of appeals have jurisdiction to review denials of Section 2.206 requests. There the court stated:

> Whenever the district courts have jurisdiction to review agency action, it means that anybody aggrieved by that action is entitled to two successive judicial reviews of it—first in the district court and then, on appeal, in the court of appeals. This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request in this case: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much.

679 F.2d at 1221.

In addition, the decision below results in the anomaly of judicial review of final agency action turning on whether the agency's decision upon an enforcement request is positive or negative.[10] It thereby undesirably "splinters judicial review of claims that arise essentially out of the same factual setting." *General Public Utilities Corporation v. Susquehanna Valley Alliance*, 449

[10] In the event an NRC Director should grant an enforcement request and institute a show cause proceeding for the granting, revoking or suspending of a license, the final decision following any hearing would, even under the rationale of the decision below, be reviewable in the courts of appeals.

U.S. 1096, 1099 (1981) (Rehnquist, J., dissenting). And, certainly, there is likely to be considerable confusion and burdensome litigation in circuits which have not addressed the jurisdictional question unless this Court resolves the conflict.

These adverse effects on the rational administration of the appellate review process are compounded by the frequency with which opportunities to seek judicial review of 2.206 denials arise. A review of the published NRC decisions discloses that in 1982 alone [11] the Director denied over a dozen requests to initiate enforcement action against nuclear licensees. Past denials have culminated in a number of appeals,[12] a course that the decision below, which effectively multiplies the choices available to an unsatisfied 2.206 petitioner, will probably encourage.

The opinion, moreover, sheds doubt on the proper avenue for challenges to NRC orders declining to institute other types of proceedings specified in Section 189a., including those "for the issuance or modification of rules and regulations dealing with the activities of licensees [or] for the payment of compensation, an award, or royalties. . . ." Since the statutory scheme for judicial review of NRC decisions on these matters parallels that analyzed by the court below, petitioners denied requests to institute rulemakings are likely to be faced with the same confusing array of appellate forums as is now the case with rejected 2.206 petitioners. Litigants will be unsure where to file challenges to any of these NRC actions. The result will be the expenditure of significant judicial, agency, and private resources to resolve jurisdictional questions that can be answered by this Court.

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[11] The 1982 Directors Decisions are reported in Volumes 15 and 16 of the Nuclear Regulatory Commission published reports.

[12] See cases cited supra at pp. 5-6.

III. The Court Below Erred in Dismissing the Appeal for Lack of Subject Matter Jurisdiction.

The decision below presents a situation in which the District of Columbia Circuit first, in *NRDC*, expressly and deliberately decided that the courts of appeals have exclusive jurisdiction to review denials of Section 2.206 enforcement requests; thereafter, every circuit which addressed the question either adopted that view or simply applied it without question. Basic jurisprudential principles would appear to dictate that, in such circumstances, the accepted interpretation should not be repudiated for other than the most compelling reasons. We submit that no such compulsion exists here.

The court below was clearly struck by the apparent conflict between the NRC's position that the measures taken to process a request for enforcement action under 10 CFR § 2.206 do not constitute a "proceeding" within the meaning of section 189a., so as to require an evidentiary hearing, and its claim that a decision denying the requested enforcement action is part of a "proceeding" within the meaning of Section 189b. for the purposes of conferring review jurisdiction upon the courts of appeal. App. 6-8, 10-14. The court held that the "unusual interlocking scheme" embodied in subsection a. and b. of Section 189 "does not allow 'proceeding' to mean one thing for procedural purposes and another for jurisdictional purposes." App. 11.[13]

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[13] To some extent this conclusion was based on the Government's statement in its initial brief that until a request for an enforcement proceeding is granted, there is no "proceeding." App. 7. However, the Government subsequently pointed out in its request for rehearing—the first opportunity it had to brief the issue—that argument was made in response to contentions that a mere enforcement request triggers a right to an evidentiary hearing under Section 189a. The Government did not mean to suggest that the denial of the request "cannot be a step in a proceeding prior to any hearing or cannot itself be an informal proceeding." Government counsel acknowledged its failure to articulate the dis-

However, this rigid view collides with the more flexible approach commonly applied by interpreters of statutes providing for judicial review, which seeks to reach a result consistent with logic as well as language. As is evident, prior decisions have interpreted "proceeding" in Section 189b. to include informal 2.206 determinations in part in order to avoid the unnecessary extra layer of judicial scrutiny which would follow if district court review were interposed between the administrative order and appeal to the circuit courts. In similar contexts, the same conclusion has been reached. Thus in *Amusement and Music Operators Ass'n. v. Copyright Royalty Tribunal*, 636 F.2d 531 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), 17 U.S.C. § 810, which provides for circuit court review of final decisions of the Copyright Tribunal "in a proceeding under section 801(b)," was constructed as conferring jurisdiction to review regulations issued under another provision. The court noted that appellate courts are well suited to consider a challenge based on the agency record, and that "[j]udicial resources would be wasted if parties could press their case upon the administrative agency, then obtain review on the agency record in the District Court, and then enjoy an appeal as of right to the Court of Appeals, which would perform precisely the same function." *Id.* at 534.

In this case, as well, the administrative record provides a fully adequate basis for judicial review. The Director's Decision clearly reflects a reasoned consideration of the merits of Ms. Lorion's allegations, and discloses the studies and analyses relied upon for their rejection. Since district court fact finding would be inappropriate in such a case,[14] no reasonable purpose would

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tinction in its original brief. Petition for Rehearing and Suggestion for Rehearing En Banc, filed in D.C. Circuit No. 82-1132, September 9, 1983, p. 3, n.2.

[14] Sierra Club v. Costle, 657 F.2d 298, 390 n.450 (D.C. Cir. 1981), holding that supplementation of the record is improper unless "no explanation for agency action appears on the record." *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); Camp v. Pitts, 411 U.S. 138, 142-43 (1973).

be served by district court review. *See Investment Company Institute v. Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977).

This Court has itself avoided the inflexible approach taken by the court below and has interpreted various review statutes in accordance with good sense and judicial economy.[15] The statute considered by the court below is no less susceptible to an interpretation in keeping with precedent and policy. A Section 189a. "proceeding" for judicial review purposes under Section 189b. can logically be viewed as having taken place whenever, after having received a request to take any of the actions specified in Section 189a., the NRC undertakes a systematic process of consideration of the request culminating in its grant or denial. Sometimes the initial steps in that proceeding lead to an evidentiary hearing; other times they do not. So viewed, denial of a 2.206 request, like dismissal of a cause of action for failure to state a claim upon which relief could be granted, simply pretermits an already commenced proceeding before a pointless evidentiary hearing has been convened. No compelling purpose can be read into Section 189 requiring treatment of a proceeding terminated at this stage differently for purposes of judicial review than one decided at a later phase.

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[15] In Frozen Food Express v. United States, 351 U.S. 40, 44 (1956), for example, this Court held that interpretive rules issued by the Interstate Commerce Commission were subject to judicial review under a statute authorizing review of "orders" of the ICC. *Accord*, United States v. Storer Broadcasting Co., 351 U.S. 192, 195 (1956). And in Foti v. Immigration and Naturalization Service, 375 U.S. 217, 221 (1963), the Court held that a statute providing for review by the courts of appeals of "all final orders of deportation . . . made . . . pursuant to administrative proceedings under section 242(b) [8 U.S.C. § 1105a.)" was broad enough to confer jurisdiction over orders made outside the administrative proceeding.

The position that Section 189 can reasonably be construed as granting courts of appeals jurisdiction to review 2.206 denials as the "necessary first step" of a 189a. proceeding, or stated somewhat differently, as termination of an informal hearing on a contention which does not merit further adjudicatory procedures, is supported by the reasoning of several decisions. These cases establish that informal procedures, similar to those applied by the Director to Ms. Lorion's request, can satisfy the hearing requirements of Section 189a.[16] The conclusion of the court below that it had no jurisdiction over denial of a 10 CFR § 2.206 request merely because it was "informal" (App. 2; *see also* App. 13) and had not reached the stage of an evidentiary hearing, was, it is submitted, therefore erroneous.

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[16] The Section 2.206 process, which requires the NRC to consider public submissions and other relevant material in acting upon the enforcement request, is essentially the same as was held to be an informal hearing meeting Section 189a. requirements in City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). In West Chicago, the city challenged the issuance of a materials license amendment. The NRC provided West Chicago with an opportunity to submit written comments. The city complained that Section 189a. required a formal adjudicatory hearing on all license amendment requests. The court rejected this argument and held that Section 189a. does not require a formal hearing for amendments to materials licenses. Similarly, in Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968), petitioner's contention that Section 189a. requires formal hearings in rulemaking proceedings was rejected by the court on the ground that an adjudicatory hearing is neither expressly required by the terms of Section 189, nor by any clear indication of Congressional intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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